

Of Course

On the first page

Of Course

...and the other 1999 Annual Choices

Matthew Kelly O'Leary

John & Shelly Johnson

Kay Maynard



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**In the Supreme Court
OF THE
United States**

OCTOBER TERM, 1973

No. 72-671

**CECILIA ESPINOZA and RUDOLFO ESPINOZA, Petitioners,
vs.
FARAH MANUFACTURING CO., INC., Respondent.**

**On Writ of Certiorari to the United States Court of Appeals
For the Fifth Circuit**

**BRIEF OF EMPLOYMENT LAW CENTER,
AMICUS CURIAE**

INTEREST OF AMICUS¹

The Employment Law Center, a project of the Legal Aid Society of San Francisco, provides free legal assistance to poor residents of San Francisco in a concentrated effort to secure and enhance their rights to equal employment opportunity. Enforcement and implementation of Title VII of the Civil Rights Act of

¹The letters of Petitioner and Respondent, consenting to the filing of this brief *amicus curiae* out of time, have been filed with the clerk.

1964 constitute a major portion of the Center's activity.

San Francisco's reputation as a multi-ethnic city, and as a focus of immigration, is statistically well founded. Resident aliens represent more than 10% of the city's population.² During the past ten years alone, 81,637 newly arrived aliens have established their residence in San Francisco.³ As described more fully below, resident aliens experience an inordinately high rate of unemployment. Moreover, fear of deportation and ignorance of the law commonly result in acceptance of shockingly substandard wages and working conditions. Among many of San Francisco's resident aliens, then, unemployment and underemployment are pervasive.

The Employment Law Center provides legal representation to the alien communities—most notably the Chinese, Japanese, Filipino and Spanish-language—within San Francisco and maintains close connections with the responsible leadership in these communities. The following argument draws upon the Center's experience in seeking legal solutions to the myriad employment problems encountered by San Francisco's resident aliens and, from this perspective, seeks to provide the Court with a broadened view of the considerations inherent in a resolution of this case.

²73,031 aliens in a total population of 715,673. United States Bureau of the Census, *Census of Population: 1970. DETAILED CHARACTERISTICS: Final Report PC(1)-D6, California, Section 1, Table 144*, p. 6-1205.

³United States Department of Justice, Immigration and Naturalization Service, "Report of the Commissioner of Immigration and Naturalization, 1972," Table 34, p. 96.

ARGUMENT

The Employment Law Center supports and adopts the arguments presented in Petitioner's Brief. The following discussion seeks to develop those arguments by reference to the employment discrimination experienced by resident aliens, because of their alienage, in San Francisco.

The Fifth Circuit's decision would seem to permit private employment discrimination on the basis of alienage even though this Court now has expressly prohibited such discrimination when the employer is a state or municipal government, *Sugarman v. Dougall*, ____ U.S. ____ , 93 Sup.Ct. 2842 (1973).⁴ Affirmance by this Court will withdraw Title VII protection from the thousands of new immigrants—quite apart from current resident aliens—who will continue to enter the United States each year under current immigration laws.⁵ Furthermore, these laws dramatically

⁴Whatever one's assessment of the various justifications for restricting certain state government positions to citizens, those justifications are utterly irrelevant to private employment as it is involved in the case at bar. Thus, consideration of a job applicant's familiarity with the history, customs or mores of this country, or assurance of his undivided national loyalty, is simply inapposite to his suitability for employment in a clothing factory.

⁵As the Brief for Petitioner points out, Congress, through the adoption of immigration and naturalization statutes, regulates the entry of aliens. These provisions clearly establish that Congress intended aliens admitted to the United States to work. Congress, in changing from a country quota to a regional quota, 8 U.S.C. §1151 (Pub.L. 89-236), enacted October 3, 1965, was aware that many more aliens of color would be immigrating to the United States. These changes in the law occurred shortly after the adoption of the Civil Rights Act of 1964. It is inconceivable that the Congress, acting within so short a time on two important pieces of legislation, would have denied protection in the one (Civil Rights Act) to those groups whose number would certainly increase because of the other (Immigration Act).

increase the immigration of people of "color",⁶ a class of persons expressly protected by Title VII.⁷ As demonstrated below, these resident aliens of color are among those most vulnerable to the evils of employment discrimination.⁸

The number of aliens permanently residing in the United States is surprisingly large. In 1972 there were 4,421,540 aliens residing in the United States.⁹

⁶As used in this brief, "people of color" and "non-white" and "non-Caucasian" refer to the countries—and people from those countries—of Asia (excluding Israel), Africa and Central and South America (including Mexico) as listed in the United States Department of Justice, Immigration and Naturalization Service, "Report of the Commissioner of Immigration and Naturalization, 1972" Table 14, p. 54.

While the word "color" in Title VII has not often been litigated and, in application, may often overlap with the word "race", it is clear that in some cases the color prohibition is broader than the race prohibition. For instance, for some purposes, such as school desegregation plans, Mexican-Americans are classified as belonging to the "white race", e.g., *Cisneros v. Corpus Christi Ind. Sch. Dist.*, 467 F.2d 142, 146 (5th Cir. 1972). However, it is readily apparent that Mexican-Americans suffer from discrimination in much the same way that "racial" minorities do. Unless our racial categories are to be redefined, then, Mexican-Americans should be protected by the more extensive color prohibition.

It should also be noted that oftentimes color is one of the first-perceived characteristics that trigger a discriminatory response. In this way color can be the more important of the two characteristics.

⁸The U. S. Equal Employment Opportunities Commission, which is charged by Congress with the responsibility of implementing Title VII of the 1964 Civil Rights Act and effectuating national policy against discrimination in employment, has interpreted Title VII's prohibition of discrimination based on national origin as encompassing a ban on discrimination based on citizenship. 29 C.F.R. §1606.1(d). The EEOC's interpretation, based on its expertise and experience gained in implementing the Act, "is entitled to great deference." *Griggs v. Duke Power Co.*, 401 U.S. 424, at 434 (1971).

⁹United States Department of Justice, Immigration and Naturalization Service, "Report of the Commissioner of Immigration and Naturalization, 1972," Table 34, p. 96.

Of these, 79.6% (3,900,059) were permanent resident aliens.¹⁰ Following long established patterns, today's immigrants are motivated by aspirations no different from those of this country's earliest settlers: they seek to escape poverty and to build a new life. However, this past decade has witnessed massive immigration not from the white countries of Europe, but rather from the poor and underdeveloped countries of Asia and Central and South America that are populated by people of color.

While more than 5,500,000 aliens of color have immigrated to this country in the 150 years beginning in 1820, over one third (37.2%) arrived only in the ten years beginning in 1963 and ending in 1972 (see appendix 1). Within this same ten year period there is a striking increase in the proportion of aliens of color as compared to white aliens admitted. Thus, in 1963, 47% of the aliens admitted into this country were people of color (see appendix 2). There is a steady increase over the years until 1972, the last year for which figures are available, when 72% of all aliens admitted were from countries populated by people of color (see appendix 2). Although this explosion of immigration by aliens of color has been a recent phenomenon, the cumulative impact is that by 1972, 52.2% (2,035,818)¹¹ of all resident aliens in the United States were from countries populated by people of color.

¹⁰*Ibid.*

¹¹"Report of the Commissioner of Immigration and Naturalization, 1972," *op.cit.*, Table 34, at p. 96. (Permanent resident aliens exclusive of those from Europe, Oceania, Israel, Canada, South Africa, stateless and all others.)

As Petitioner argues, the stigma of alienage alone is more than enough to erect high barriers to the meaningful employment of this class of easily exploitable people. Wages and working conditions are commonly substandard, and the unscrupulous employer can maintain his advantage through unfounded—though real to the uneducated alien—threats of deportation. To add to this the further badge of color, a condition borne by 72% of the resident aliens admitted in 1972, is to make these already high barriers practically insurmountable.

As Petitioner states, Congress expressly sought to obliterate this badge of color as an obstacle to obtaining meaningful employment by enacting Title VII of the 1964 Civil Rights Act. Employers should not now be allowed to escape this prohibition by the imposition of an anti-alien policy.¹²

The cumulative effect of the invidious classifications of alienage and color is vividly illustrated by employ-

¹²To insist upon citizenship as a condition to Title VII's protections is not only without justification in the legislative history, but brings it out of conformance with other provisions of the 1964 Civil Rights Act. For instance, the public accommodations section, codified as Title II, is not restricted only to citizens. Secretary of State Dean Rusk's testimony on Title II points out the necessary concern that the protection against discrimination based on color not be limited to citizens:

"I now turn to a special concern of the Department of State: The treatment of non-white diplomats and visitors to the United States. We cannot expect the friendship and respect of non-white nations if we humiliate their representatives by denying them, say, service in a highway restaurant or city cafe.

"Under international law and through the practice of nations, a host country owes certain duties to the diplomatic

ment statistics from San Francisco. 27.6% (972,560)¹³ of all resident aliens in the United States in 1972 live in California (see appendix 3). As mentioned above, a large portion of these aliens reside in San Francisco, making up 10.2% of the city's population (73,031 aliens out of a total population of 715,673).¹⁴ Of these resident aliens, a full 72.5% (52,980)¹⁵ are people of color. During the past ten years, 81,637 aliens established residence in San Francisco (see appendix 4).¹⁶ Forty-four and a half per cent (36,324) immigrated from Mexico, the Philippines, and China alone.¹⁷

representatives which are accredited to it, in order to facilitate the discharge by those representatives of their functions. . . . These obligations are not properly discharged, in my view, unless diplomatic representatives have access, without discrimination or hindrance, to the public accommodations required by travelers in going about their business."

Hearings on S. 1732 before Senate Committee on Commerce, 88th Congress, 1st Session, ser. 26, pt. 1, at 283 (1963).

¹³"Report of the Commissioner of Immigration and Naturalization, 1972," *op.cit.*, Table 34, p. 96.

¹⁴United States Bureau of the Census, *Census of Population: 1970. DETAILED CHARACTERISTICS: Final Report PC(1)-D6, California, Section 1, Table 144*, p. 6-1205.

It should be pointed out that the greater proportion of these aliens were between the ages of 18 and 64. The 1970 census figures show that 71.6% of the aliens in California and 73.9% of those in San Francisco were within this high-employability age group. *Census of Population, DETAILED CHARACTERISTICS, op.cit.*, Table 143, pp. 6-1194 and 6-1196. While the census figures do not distinguish between temporary and resident aliens, other figures indicate that 97% of all aliens in California in 1972 were resident aliens. "Report of the Commissioner of Immigration and Naturalization, 1972," *op.cit.*, Table 35, p. 97.

¹⁵*Census of Population: 1970. DETAILED CHARACTERISTICS, op.cit.*, Table 144, p. 6-1205.

¹⁶"Report of the Commissioner of Immigration and Naturalization, 1972," *op.cit.*, Tables 12A/12B.

¹⁷*Ibid.*

That these newer groups face invidious discrimination in employment is clear from the mean and median family income figures for their racial and ethnic groupings as a whole (see appendix 5). Thus, resident aliens whose countries of origin experienced the smallest percentage of immigration in the past ten years (the European and other white countries plus Japan) had the highest mean and median family incomes.¹⁸ Conversely ethnic groups experiencing the largest percentage of immigration in the past ten years (China and the Spanish speaking countries) had the lowest mean and median family incomes (see appendix 5).¹⁹

Another reliable indicator of the problems encountered by alien groups of color is the unemployment rate. While totally precise figures are not available, the Bay Area Social Planning Council, in its report "Chinese Newcomers in San Francisco," February, 1971, fnt. 1, at p. 40, estimated that 27.8% of the Chinese male immigrants in San Francisco as of January, 1969 were unemployed.²⁰

¹⁸"City/County Population Statistics and Poverty Indicators." EOC District Population Statistics and Poverty Indicators from the 1970 Census and Other Sources (Addendum dated March 15, 1973, to EOC form 205—Second Revision, January 15, 1973).

¹⁹*Ibid.*

²⁰It has recently been recognized that a more accurate indication of the employment picture is the subemployment index, which measures the percentage of workers who are unemployed or who do not earn enough to bring them and their families above the poverty level. See, e.g., 4 BNA Manpower Information Service 607 (1973). The subemployment index is generally estimated as two or three times as large as the unemployment rate.

The Council's report went on to describe the employment problems of recent Chinese immigrants, at pp. 39-41:

"Of key importance to the Chinese newcomer, if he is to take his place as a functioning member of American society, is his ability to compete in the labor market on an equal footing with other job seekers and thereby obtain employment which will enable him to provide for his own and his family's economic needs and dignity. Unfortunately, for many of San Francisco's Chinese newcomers, this is not a likely prospect.

* * *

"Because of their lack of English ability, most new arrivals seek employment in Chinatown firms where low wages and long hours often prevail. Such employment, while providing the immigrant with some means of support, may actually mitigate against his chances of entering the general labor market. The newcomer in effect becomes locked into a system which limits his contacts to other Chinese-speaking persons, requires him to work long hours for subsistence, and leaves him little time to upgrade his skills by participating in English and vocational education classes."

Unfortunately, such problems are not peculiar to Chinese immigrants but are encountered in similar form by other alien groups.

CONCLUSION

For the reasons indicated above, the decision of the Court of Appeals for the Fifth Circuit should be reversed and the case remanded to the District Court for the granting of appropriate relief.

Dated, San Francisco, California,
October 5, 1973.

Respectfully submitted,

KENNETH HECHT

CASSANDRA FLIPPER

COREY Y. S. PARK

MICHAEL C. TOBRINER

Employment Law Center

795 Turk Street

San Francisco, California 94102

Attorneys for Amicus Curiae

Of Counsel:

MICHAEL WETMORE

JOE BREITENEICHER

KAZ MANIWA

APPENDIX 1

NUMBER AND PERCENT OF RESIDENT ALIENS
ADMITTED, 1820-1972 and 1963-1972. (a)

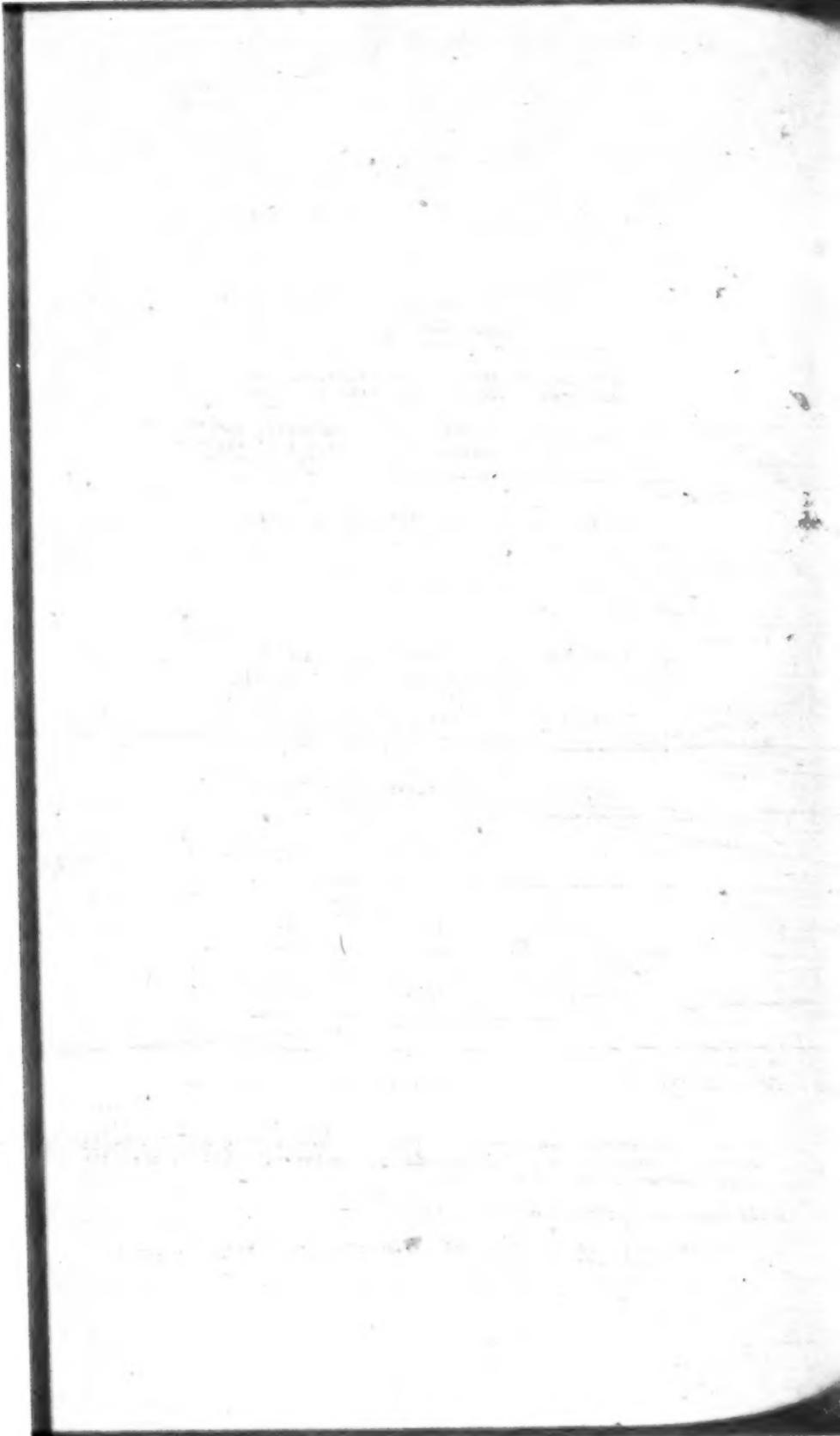
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Countries of Origin	A 1820-1972	B 1963-1972	1963-1972 Immigration as a % of 1820-1972 Immigration
Caucasian	39,931,044	1,465,955	3.7%
Non-Caucasian	5,790,898	2,055,902	37.2%
All Asia	1,898,689	624,497	32.8%
China Taiwan Hong Kong	459,411	153,126	33.3%
Japan	375,070	39,525	10.5%
Phillipines	(b)	153,327	82.6% (c)
All Africa	87,789	48,735	55.5%
Mexico	1,707,125	460,521	27.0%
All Other Central and South America	3,804,420	1,398,090	36.7%

a) From United States Department of Justice, Immigration and Naturalization Service, "Report of the Commissioner of Immigration and Naturalization, 1972" Tables 13 and 14 p. 51-54.

b) No accurate figures for 1820-1972.

c) t derived by dividing 1968-1972 sub-total into 1963-1972 total:
1963-1967. . 26,712
1968-1972. . 126,525



APPENDIX 2

NUMBER AND PERCENTAGE OF RESIDENT
ALIENS ADMITTED FOR YEARS ENDING
JUNE 30, 1963-1972 (a)

Countries of Origin	1963	1964	1965	1966	1967	1968	1969	1970	1971	1972
Total	306260	292248	296697	323040	361972	454448	358579	373326	370478	384685
Caucasian	163428	162455	154149	154592	164555	169996	141301	135025	114298	106156
%	53	56	52	48	45	37	39	36	31	28
Non-Caucasian	142956	129793	142548	168448	197417	284452	217278	238301	256180	278529
%	47	44	48	52	55	63	61	64	69	72
All Asia (except Israel)	23696	20905	19801	40493	59965	57000	73630	92903	102722	118959
China Taiwan Hong Kong	5370	5648	4769	17608	25096	16434	20893	17956	17622	21730
Korea	2580	2362	2165	2492	3956	3811	6045	9314	14297	18876
Philippines	3618	3006	3130	6093	10865	16731	20744	31283	28471	29376
Japan	4056	3680	3180	3394	3946	3613	3957	4485	4457	4757
Mexico	55253	32967	37969	45163	42371	43563	44623	44469	50103	54040
other Central and South Amer.	38449	51932	50433	53819	74325	156835	69321	70841	76883	69559

(a) From United States Department of Justice, Immigration and Naturalization Service, "Report of the Commissioner of Immigration and Naturalization, 1972" Table 54.

APPENDIX 3

NUMBER AND PERCENT OF RESIDENT ALIENS IN
UNITED STATES AND CALIFORNIA. PLUS NUMBER
AND PERCENT OF NON-CAUCASIAN RESIDENT ALIENS
IN CALIFORNIA, 1963-1972. (a)

	A Number of Resident Aliens in U.S.	B Number of Resident Aliens in Calif.	C Calif. Aliens as a % of U.S. Aliens	D Number of Non-Caucasian U.S. Aliens	E Non-Caucasian Aliens in Calif. As a % of Total Aliens in Calif.
1972	3,900,059	972,560	27.6%	677,488	69.7%
1971	3,679,502	930,074	25.3%	638,841	68.7%
1970	3,719,750	916,365	24.6%	604,810	66.0%
1969	3,506,359	871,585	24.9%	558,701	64.1%
1968	3,405,177	858,674	25.2%	527,160	61.4%
1967	3,210,768	808,240	25.2%	491,591	60.8%
1966	3,088,133	795,187	25.7%	477,475	60.0%
1965	3,024,278	756,841	25.0%	447,558	59.1%
1964	2,966,732	717,280	24.2%	411,122	57.3%
1963	2,892,015	665,558	23.0%	372,412	55.9%

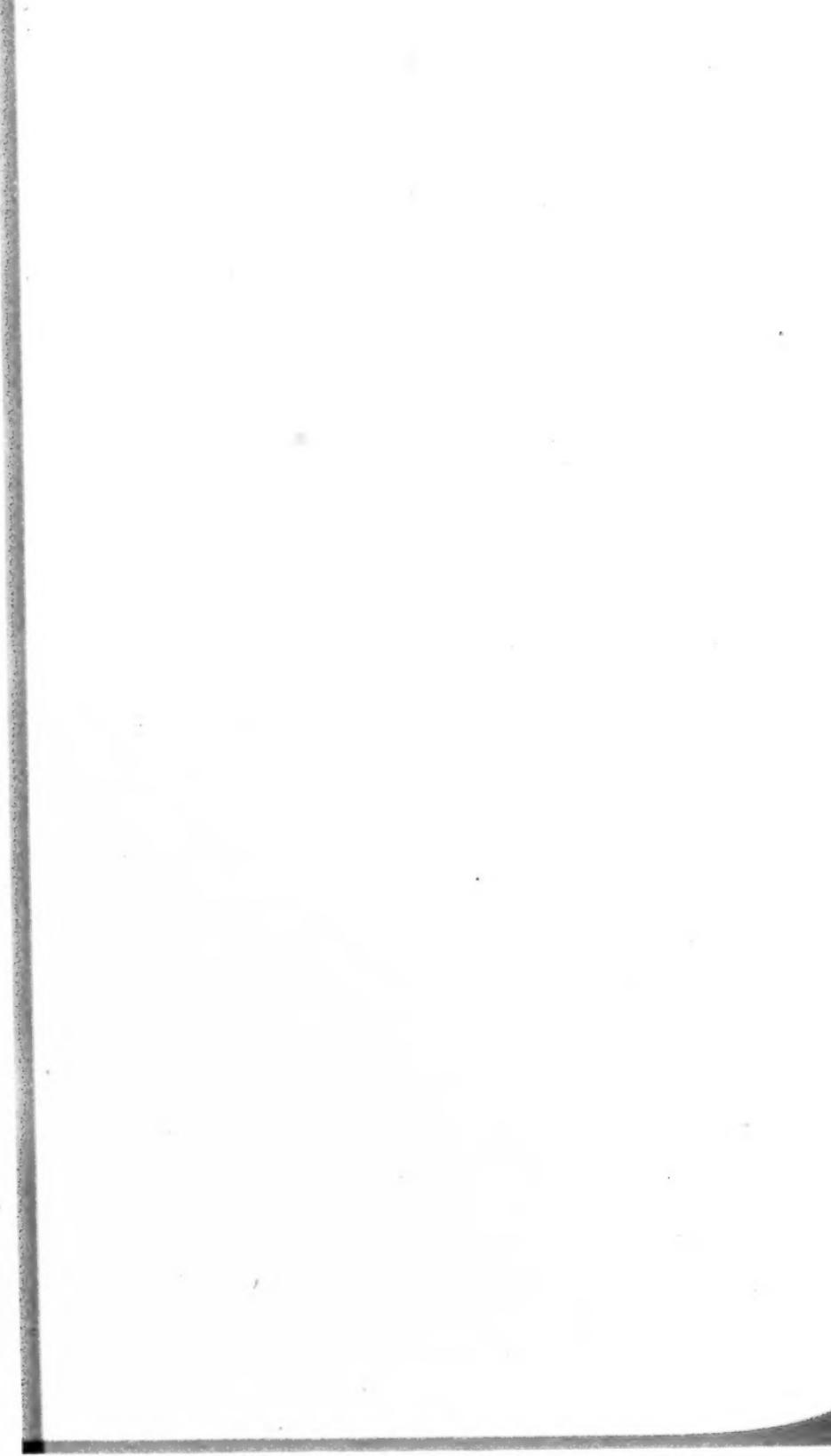
(a) From United States Department of Justice, Immigration and Naturalization Service, "Report of the Commissioner of Immigration and Naturalization", 1963-1972, Table 34.

APPENDIX 4

RESIDENT ALIENS ADMITTED, BY COUNTRY OF
BIRTH, WHOSE INITIAL RESIDENCE IN
UNITED STATES WAS IN SAN FRANCISCO,
YEARS ENDING JUNE 30, 1963-1972 (a)

	All countries	Mexico	Phillipines	China Hong Kong Taiwan
Total	81,637	4000	16,447	15,877
1972	8464	398	2846	1434
1971	6997	347	2593	820
1970	9933	321	3693	1605
1969	8894	300	2368	2205
1968	7986	425	1768	1653
1967	8583	467	1179	2883
1966	8969	392	886	3181
1965	6961	425	377	706
1964	7362	368	340	640
1963	7576	557	397	750

(a) From United States Department of Justice, Immigration and Naturalization Service, "Report of the Commissioner of Immigration and Naturalization" 1963-1972, Tables 12A,12B,13.



APPENDIX 5

MEAN AND MEDIAN FAMILY INCOME, RACIAL
AND ETHNIC GROUPS IN SAN FRANCISCO, 1970
(a)

All Races	Black	Chinese	Japanese	Spanish Language*	White
Median Family Income	\$10,495	\$7676	\$9879	\$11,545	\$9488
Mean Family Income	\$12,339	\$8535	\$10,986	\$12,323	\$13,311

(a) From "City/County Population Statistics and Poverty Indicators." EOC District Population Statistics and Poverty Indicators From the 1970 Census and Other Sources (Addendum dated March 15, 1973, to EOC form 205--Second Revision, January 15, 1973.)